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6 **IN THE UNITED STATES DISTRICT COURT**

7 **FOR THE DISTRICT OF ARIZONA**

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9 Jeffrey Allen Herald,

10 Plaintiff,

11 vs.

12 Correctional Health Services, et al.,

13 Defendants.

No. CV 10-2732-PHX-RCB (MEA)

14 **ORDER**

15 Plaintiff Jeffrey Allen Herald, who is confined in the Maricopa County Durango Jail,

16 has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. 1) and an

17 Application to Proceed *In Forma Pauperis* (Doc. 3). The Court will dismiss the Complaint

18 with leave to amend.

19 **I. Application to Proceed *In Forma Pauperis* and Filing Fee**

20 Plaintiff's Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C.

21 § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1). The

22 Court will assess an initial partial filing fee of \$3.83. The remainder of the fee will be

23 collected monthly in payments of 20% of the previous month's income each time the amount

24 in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). The Court will enter a separate Order

25 requiring the appropriate government agency to collect and forward the fees according to the

26 statutory formula.

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## II. Statutory Screening of Prisoner Complaints

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised claims that are legally frivolous or malicious, that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

A pleading must contain a “short and plain statement of the claim *showing* that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not demand detailed factual allegations, “it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Id.

“[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Id. (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. “Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” Id. at 1950. Thus, although a plaintiff’s specific factual allegations may be consistent with a constitutional claim, a court must assess whether there are other “more likely explanations” for a defendant’s conduct. Id. at 1951.

But as the United States Court of Appeals for the Ninth Circuit has instructed, courts must “continue to construe *pro se* filings liberally.” Hebbe v. Pliler, No. 07-17265, 2010 WL 2947323, at \*3 (9th Cir. Jul. 29, 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent standards than formal pleadings drafted by lawyers.’” Id. (quoting Erickson v. Pardus, 551 U.S. 89, 94 (2007) (*per curiam*)).

1 If the Court determines that a pleading could be cured by the allegation of other facts,  
 2 a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal of the  
 3 action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*). The Court  
 4 should not, however, advise the litigant how to cure the defects. This type of advice “would  
 5 undermine district judges’ role as impartial decisionmakers.” Pliler v. Ford, 542 U.S. 225,  
 6 231 (2004); see also Lopez, 203 F.3d at 1131 n.13 (declining to decide whether the court was  
 7 required to inform a litigant of deficiencies). Plaintiff’s Complaint will be dismissed for  
 8 failure to state a claim, with leave to amend because the Complaint may possibly be saved by  
 9 amendment.

### 10 **III. Complaint**

11 In his two-count Complaint, Plaintiff sues Defendants Correctional Health Services and  
 12 Maricopa County Sheriff Joseph Arpaio. In both Counts, Plaintiff alleges that he has been  
 13 subjected to unconstitutional conditions of confinement in violation of his Fourteenth  
 14 Amendment due process rights.

15 In Count One, Plaintiff contends that Defendant Correctional Health Services operated  
 16 on Plaintiff’s foot, which now has permanent damage. Plaintiff asserts that “[b]y their  
 17 inexperience[,] my cancer is spreading and [Defendant Correctional Health Services] thinks  
 18 Milk of Magnesia and Fiber Plus would work for treatment.” In Count Two, Plaintiff claims  
 19 that he was housed in a condemned building, with infections, mice, and spiders, and that the  
 20 building was overcrowded.

21 In his Request for Relief, Plaintiff seeks monetary damages.

### 22 **IV. Failure to State a Claim**

#### 23 **A. Improper Defendant**

24 Defendant Correctional Health Services is an improper Defendant. Municipalities and  
 25 other local governing bodies are included among those “persons” who may be sued under  
 26 § 1983. Monell v. Department of Social Services of New York, 436 U.S. 658, 690-91 (1978).  
 27 Because Correctional Health Services is an administrative subdivision of Maricopa County and  
 28 not a municipal corporation, a local governing body or a private corporation, it is not a

1 “person” amenable to suit under § 1983. Maricopa County is responsible for providing  
2 medical care to county jail inmates. See Ariz. Rev. Stat. § 11-291(A). Any actions concerning  
3 a county policy must be brought against the county itself and not against an administrative  
4 subdivision of the county. Thus, Defendant Maricopa County Correctional Health Services is  
5 an improper defendant and will be dismissed from this action.

6 **B. Failure to Link Defendant with Injuries**

7 To state a valid claim under § 1983, plaintiffs must allege that they suffered a specific  
8 injury as a result of specific conduct of a defendant and show an affirmative link between the  
9 injury and the conduct of that defendant. See Rizzo v. Goode, 423 U.S. 362, 371-72, 377  
10 (1976). There is no *respondeat superior* liability under § 1983, and therefore, a defendant’s  
11 position as the supervisor of persons who allegedly violated Plaintiff’s constitutional rights  
12 does not impose liability. Monell, 436 U.S. at 691-92; Hamilton v. Endell, 981 F.2d 1062,  
13 1067 (9th Cir. 1992); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). “Because vicarious  
14 liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official  
15 defendant, through the official’s own individual actions, has violated the constitution.” Iqbal,  
16 129 S. Ct. at 1948.

17 Plaintiff has not alleged that Defendant Arpaio personally participated in a deprivation  
18 of Plaintiff’s constitutional rights, was aware of a deprivation and failed to act, or formed  
19 policies that resulted in Plaintiff’s injuries. Thus, the Court will dismiss without prejudice  
20 Defendant Arpaio.

21 **V. Leave to Amend**

22 For the foregoing reasons, Plaintiff’s Complaint will be dismissed for failure to state  
23 a claim upon which relief may be granted. Within 30 days, Plaintiff may submit a first  
24 amended complaint to cure the deficiencies outlined above. The Clerk of Court will mail  
25 Plaintiff a court-approved form to use for filing a first amended complaint. If Plaintiff fails  
26 to use the court-approved form, the Court may strike the amended complaint and dismiss this  
27 action without further notice to Plaintiff.

28 . . . .

1 Plaintiff must clearly designate on the face of the document that it is the “First  
2 Amended Complaint.” The first amended complaint must be retyped or rewritten in its entirety  
3 on the court-approved form and may not incorporate any part of the original Complaint by  
4 reference. Plaintiff may include only one claim per count.

5 If Plaintiff files an amended complaint, Plaintiff must write short, plain statements  
6 telling the Court: (1) the constitutional right Plaintiff believes was violated; (2) the name of  
7 the Defendant who violated the right; (3) exactly what that Defendant did or failed to do;  
8 (4) how the action or inaction of that Defendant is connected to the violation of Plaintiff’s  
9 constitutional right; and (5) what specific injury Plaintiff suffered because of that Defendant’s  
10 conduct. See Rizzo, 423 U.S. at 371-72, 377.

11 Plaintiff must repeat this process for each person he names as a Defendant. If Plaintiff  
12 fails to affirmatively link the conduct of each named Defendant with the specific injury  
13 suffered by Plaintiff, the allegations against that Defendant will be dismissed for failure to  
14 state a claim. **Conclusory allegations that a Defendant or group of Defendants have**  
15 **violated a constitutional right are not acceptable and will be dismissed.**

16 Plaintiff should take note that not every claim by a prisoner relating to inadequate  
17 medical treatment states a violation of the Eighth or Fourteenth Amendment. To state a § 1983  
18 medical claim, a plaintiff must show that the defendants acted with “deliberate indifference to  
19 serious medical needs.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle  
20 v. Gamble, 429 U.S. 97, 104 (1976)). A plaintiff must show (1) a “serious medical need” by  
21 demonstrating that failure to treat the condition could result in further significant injury or the  
22 unnecessary and wanton infliction of pain and (2) the defendant’s response was deliberately  
23 indifferent. Jett, 439 F.3d at 1096 (quotations omitted).

24 “Deliberate indifference is a high legal standard.” Toguchi v. Chung, 391 F.3d 1051,  
25 1060 (9th Cir. 2004). To act with deliberate indifference, a prison official must both know  
26 of and disregard an excessive risk to inmate health; “the official must both be aware of facts  
27 from which the inference could be drawn that a substantial risk of serious harm exists, and he  
28 must also draw the inference.” Farmer v. Brennan, 511 U.S. 825, 837 (1994). Deliberate

1 indifference in the medical context may be shown by a purposeful act or failure to respond to  
 2 a prisoner's pain or possible medical need and harm caused by the indifference. Jett, 439 F.3d  
 3 at 1096. Deliberate indifference may also be shown when a prison official intentionally  
 4 denies, delays, or interferes with medical treatment or by the way prison doctors respond to  
 5 the prisoner's medical needs. Estelle, 429 U.S. at 104-05; Jett, 439 F.3d at 1096.

6 Deliberate indifference is a higher standard than negligence or lack of ordinary due care  
 7 for the prisoner's safety. Farmer, 511 U.S. at 835. "Neither negligence nor gross negligence  
 8 will constitute deliberate indifference." Clement v. California Dep't of Corrections, 220 F.  
 9 Supp. 2d 1098, 1105 (N.D. Cal. 2002); see also Broughton v. Cutter Labs., 622 F.2d 458, 460  
 10 (9th Cir. 1980) (mere claims of "indifference," "negligence," or "medical malpractice" do not  
 11 support a claim under § 1983). "A difference of opinion does not amount to deliberate  
 12 indifference to [a plaintiff's] serious medical needs." Sanchez v. Vild, 891 F.2d 240, 242 (9th  
 13 Cir. 1989). A mere delay in medical care, without more, is insufficient to state a claim against  
 14 prison officials for deliberate indifference. See Shapley v. Nevada Bd. of State Prison  
 15 Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985). The indifference must be substantial. The  
 16 action must rise to a level of "unnecessary and wanton infliction of pain." Estelle, 429 U.S.  
 17 at 105.

18 Plaintiff should also take note that a pretrial detainee's claim for unconstitutional  
 19 conditions of confinement arises from the Fourteenth Amendment Due Process Clause rather  
 20 than from the Eighth Amendment prohibition against cruel and unusual punishment. Bell v.  
 21 Wolfish, 441 U.S. 520, 535 and n.16 (1979). Nevertheless, the same standards are applied,  
 22 requiring proof that the defendant acted with deliberate indifference. See Frost v. Agnos, 152  
 23 F.3d 1124, 1128 (9th Cir. 1998).

24 To state a claim of deliberate indifference, plaintiffs must meet a two-part test. First,  
 25 the alleged constitutional deprivation must be, objectively, "sufficiently serious"; the official's  
 26 act or omission must result in the denial of "the minimal civilized measure of life's  
 27 necessities." Farmer, 511 U.S. at 834. Second, the prison official must have a "sufficiently  
 28 culpable state of mind," *i.e.*, he must act with deliberate indifference to inmate health or safety.

1 Id. In defining “deliberate indifference” in this context, the Supreme Court has imposed a  
 2 subjective test: “the official must both be aware of facts from which the inference could be  
 3 drawn that a substantial risk of serious harm exists, and he must also draw the inference.” Id.  
 4 at 837 (emphasis added).

5 A first amended complaint supersedes the original complaint. Ferdik v. Bonzelet, 963  
 6 F.2d 1258, 1262 (9th Cir. 1992); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542,  
 7 1546 (9th Cir. 1990). After amendment, the Court will treat an original complaint as  
 8 nonexistent. Ferdik, 963 F.2d at 1262. Any cause of action that was raised in the original  
 9 complaint is waived if it is not raised in a first amended complaint. King v. Atiyeh, 814 F.2d  
 10 565, 567 (9th Cir. 1987)

## 11 **VI. Warnings**

### 12 **A. Release**

13 Plaintiff must pay the unpaid balance of the filing fee within 120 days of his release.  
 14 Also, within 30 days of his release, he must either (1) notify the Court that he intends to pay  
 15 the balance or (2) show good cause, in writing, why he cannot. Failure to comply may result  
 16 in dismissal of this action.

### 17 **B. Address Changes**

18 Plaintiff must file and serve a notice of a change of address in accordance with Rule  
 19 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other  
 20 relief with a notice of change of address. Failure to comply may result in dismissal of this  
 21 action.

### 22 **C. Copies**

23 Plaintiff must submit an additional copy of every filing for use by the Court. See LRCiv  
 24 5.4. Failure to comply may result in the filing being stricken without further notice to  
 25 Plaintiff.

### 26 **D. Possible “Strike”**

27 Because the Complaint has been dismissed for failure to state a claim, if Plaintiff fails  
 28 to file an amended complaint correcting the deficiencies identified in this Order, the dismissal



1 may count as a “strike” under the “3-strikes” provision of 28 U.S.C. § 1915(g). Under the 3-  
 2 strikes provision, a prisoner may not bring a civil action or appeal a civil judgment *in forma*  
 3 *pauperis* under 28 U.S.C. § 1915 “if the prisoner has, on 3 or more prior occasions, while  
 4 incarcerated or detained in any facility, brought an action or appeal in a court of the United  
 5 States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim  
 6 upon which relief may be granted, unless the prisoner is under imminent danger of serious  
 7 physical injury.” 28 U.S.C. § 1915(g).

8 **E. Possible Dismissal**

9 If Plaintiff fails to timely comply with every provision of this Order, including these  
 10 warnings, the Court may dismiss this action without further notice. See Ferdik, 963 F.2d at  
 11 1260-61 (a district court may dismiss an action for failure to comply with any order of the  
 12 Court).

13 **IT IS ORDERED:**

14 (1) Plaintiff’s Application to Proceed *In Forma Pauperis* (Doc. 3) is **granted**.

15 (2) As required by the accompanying Order to the appropriate government agency,  
 16 Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing fee of \$3.83.

17 (3) The Complaint (Doc. 1) is **dismissed** for failure to state a claim. Plaintiff has  
 18 **30 days** from the date this Order is filed to file a first amended complaint in compliance with  
 19 this Order.

20 (4) If Plaintiff fails to file an amended complaint within 30 days, the Clerk of Court  
 21 must, without further notice, enter a judgment of dismissal of this action with prejudice that  
 22 states that the dismissal may count as a “strike” under 28 U.S.C. § 1915(g).

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1 (5) The Clerk of Court must mail Plaintiff a court-approved form for filing a civil  
2 rights complaint by a prisoner.

3 DATED this 24 day of December, 2010.

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6 Robert C. Broomfield  
7 Senior United States District Judge  
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